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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

INTERSTATE COMMERCE COMMISSION, *Appellant*,

v.

J-T TRANSPORT COMPANY, INC., ET AL., *Appellees*.

U.S.A.C. TRANSPORT, INC., ET AL., *Appellants*,

v.

J-T TRANSPORT COMPANY, INC., ET AL., *Appellees*.

On Appeals from the United States District Court for the Western District of Missouri—Western Division

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BRIEF FOR CONTRACT CARRIER CONFERENCE OF AMERICAN TRUCKING ASSOCIATIONS, INC.

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OPINIONS BELOW

The opinion of the District Court (R. 160) is reported at 185 F. Supp. 838. The decision of Division 1 of the Interstate Commerce Commission and that of the entire Commission appear at 74 M.C.C. 324 and 79 M.C.C. 695, respectively (R. 22, 28).

JURISDICTION

This is an appeal from the judgment of the District Court entered August 9, 1960 (R. 159). The Interstate Commerce Commission filed its notice of appeal on October 6, 1960 (R. 180) and other appellants filed notice of appeal on October 7, 1960 (R. 184). Probable jurisdiction was noted February 20, 1961 (R. 186). The jurisdiction of this Court is conferred by 28 U.S.C. 1253 and 2101(b).

STATUTES INVOLVED

This appeal involves the construction of sections 203(a)(15) and 209(b) of the Interstate Commerce Act, as amended August 22, 1957, 49 U.S.C. 303(a)(15) and 309(b), 71 stat. 411. These statutory provisions as formerly written and as amended are set forth in the Appendix hereto.

STATEMENT OF THE CASE

No separate statement by this appellee is deemed necessary. We will, therefore rely upon the statement of the case made by appellee J-T Transport Company, Inc., and the facts which it will set forth.

QUESTIONS PRESENTED

1. Whether, under the 1957 amendments to section 203(a)(15) and 209(b) of the Interstate Commerce Act, the Commission may, in passing upon applications for contract carrier permits, base its determination on the willingness and ability of common carriers to render the proposed service.

2. Whether the specific criteria set forth in section 209(b) of the Act represent a change in the standards for determining consistency with the public interest and the national transportation policy and whether the Com-

mission improperly interpreted and applied these criteria.

3. Whether the District Court erred in its interpretation of the Commission's findings and its application of section 209(b).

ARGUMENT

I. IN PASSING UPON AN APPLICATION FOR A CONTRACT CARRIER PERMIT UNDER SECTION 209(b) OF THE INTERSTATE COMMERCE ACT THE WILLINGNESS AND ABILITY OF COMMON CARRIERS IS NOT A RELEVANT CONSIDERATION.

While it is the language of a statute that must be interpreted, resort to extrinsic aids is permissable in determining its meaning. In this proceeding it is believed that the legislative history of the amendments involved, including developments which led to their enactment,[1] cannot be divorced from the language of the statute. It is the key to a better understanding of the significance and meaning of the language employed by Congress.

Prior to the amendments of 1957 a contract carrier was defined by section 203(b)(15) of the Interstate Commerce Act as "any person which under individual contracts or agreements engages in the transportation (other than transportation referred to in paragraph (14) and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation." 54 Stat. 920. Section 209(b) of the Act authorized the issuance of a permit to a contract carrier where the proposed operation was consistent with the public interest and the national transportation policy. A proviso to the

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[1] Legislative history in its broadest sense includes (1) the events leading up to the introduction of the bill out of which the statute under consideration developed, (2) the consideration of the original bill from the time of its introduction until its final enactment as the present statute, and (3) the history of the statute since its enactment. 2 Sutherland, Statutes and Statutory Constructions 5001 (3d ed. Horack, 1943).

section stated "That no terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit . . . as the development of the business and the demands of the public may require." 49 Stat. 552. Thus, the only statutory requirement to qualify as a contract carrier was that the transportation be performed under individual or special contracts and the Commission had no authority over the number of contracts which the carrier could enter into. A contract carrier, once having obtained a permit, could, if it chose, solicit all available traffic within the scope of its authority, even though the authority might have been granted originally on the basis of the support of a single shipper. This latitude unquestionably affected the Commission's regulatory policies and perhaps more than any other factor led to the Commission's desire for new legislation.

Under both common law [2] and the Interstate Commerce Act, contract carriers have acted as a substitute for private carriage. It is believed that a substantial majority of contract carriers have always filled this role. Prior to the 1957 amendments, however, there was a wide range in the size and activities of contract carriers.[3] Some of the larger carriers with extensive authority handled traffic for any shipper who was willing to sign a contract. The number of contracting shippers served by some carriers seemed to indicate a virtual holding out of service to the general public. Where this occurred, these operations became more competitive with those of common car-

[2] Under common law such carriers were generally referred to as private carriers for hire.

[3] With the exception of certain highly specialized fields, *e.g.* armored carriers, this is no longer true. Contract carriers which did not meet the new definition have been issued certificates as common carriers pursuant to the provisions of section 212 (c) of the Interstate Commerce Act, 49 U.S.C. 312 (c).

riers. The Commission believed that the preservation of an adequate common carrier system required greater control of non-selective contract carriers. Lacking the power to limit the service of contract carriers to specific shippers, or to place a ceiling on the number of contracting shippers which could be served, the Commission devised other methods.

The first of these was the application of a public convenience and necessity standard to contract carrier applications. A notable articulation of this standard is found in *William Heim Cartage Co. Ext.—Indianapolis*, 20 M.C.C. 329, 331-332, where the following language appears:

> "Where a permit is sought to engage in the transportation of property, the burden is upon applicant to show that facilities of existing carriers serving the territory in question are inadequate, or that they are not rendering a type or character of service which satisfies *the public need and convenience, and that the proposed service would tend to correct or substantially improve that condition.*" (Emphasis added)

The second method employed by the Commission was the so-called specialization test. This test, derived from the language of section 203(a)(15), held that the legitimate purpose of contract carriers was to furnish a specialized and individual service required by the peculiar needs of a particular shipper and which a common carrier, because of its obligations to the general public, could not well undertake to supply. *Keystone Transp. Co. Contract Carrier Application*, 19 M.C.C. 475, 498. Changes in the motor carrier industry required further elaboration of the specialization test.[4] Eventually, common carriers began to

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[4] In *Craig Contract Carrier Application*, 31 M.C.C. 705, 712 it was stated:

> "The specialization which we have in mind may consist in the rendition of other than the usual physical services for the purpose of supplying the peculiar needs of a particular shipper, such, for example, as the furnishing of equipment

provide many services which had once been considered specialized, and in attempting to resolve the difficulties of applying the test, the Commission turned to the number of shippers served as a controlling factor. *Transportation Activities of Midwest Transfer Co.*, 49 M.C.C. 38. However, in *United States* v. *Contract Steel Carriers*, 350 U.S. 409, 76 S. Ct. 461 (1956), this Court considered the case of a contract carrier who by active solicitation had secured 69 contracts from 1951 to 1954, and concluded that if specialization was to be read into the statute, it was satisfied under the facts of the case. The Court also held that a contract carrier was free to aggressively search for new business within the limits of his license.

As a result of this decision the Commission recommended to Congress that both sections 203(a) (15) and 209(b) of the Act be amended so as to clarify the distinction between common and contract carriers and provide for more control over the latter. 70th Annual Report of the Interstate Commerce Commission, November 1, 1956, pp. 162-164. To implement these recommendations, the Commission initiated the introduction in Congress of two identical bills, H.R. 5123, and S. 1384, which proposed to redefine contract carriage as follows:

> "The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one

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especially designed to carry a particular type of commodity, the training of employees in the proper handling of particular commodities, or the supplying of related nontransportation services such as assembling, placing, or servicing of machinery. Or it may consist of nothing more than the devotion of all of a carrier's efforts to the service of a particular shipper, or, at most, a very limited number of shippers, under a continuing arrangement which makes the carrier virtually a part of the shipper's organization."

> person or a limited number of persons for the furnishing of transportation services of a special and individual nature required by the customer and *not provided by common carriers.*" (Emphasis added.)

They also provided that contract carriers who did not meet the amended definition would be issued certificates as common carriers. Section 209(b) would be amended to provide that a contract carrier permit could be issued only upon a showing "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown," and that the Commission could impose in such permit limitations as to the person or persons and the number or class thereof who could be served.

Some of these proposals generated sharp opposition, which was expressed in hearings before the Senate. *Surface Transportation—Scope of Authority—I.C.C., Hearings before a Subcommittee of the Senate Interstate and Foreign Commerce Committee*, 85th Cong., 1st Sess. (1957). The Contract Carrier Conference and certain shippers using contract carrier service were opposed to the language of the bills as originally introduced. There was also opposition from other sources, including other government departments.

The Deputy Attorney General of the United States, dispatched a letter to Senator Warren G. Magnuson in which he stated (*Hearings, supra*, p. 11).

> "The bill would amend section 203(a)(15) of the act by changing the definition of 'contract carrier' to mean any person who engages in transportation by motor vehicle of passengers or property in interstate commerce for compensation (with the exception of common carriers by motor vehicle and those engaged in motor vehicle transportation for hire as an express company) 'under continuing contracts with one person or a limited number of persons for the furnishing of transportation services of a special and individual nature required by the customer and not provided by common carriers.'

"We are opposed to enactment of that part of the definition which reads, 'and not provided by common carriers.' This quoted limitation is rather vague and it could lead to the contention by common carriers that they provide contract carrier services. Such an interpretation might unduly limit the number and availability of contract carriers. Many contract carriers are small-business men who would not be able to compete on a common-carrier basis.

"The bill would also amend section 209(b) of the Act, which sets forth the procedure and criteria to be observed in granting contract carrier permits, by adding a new criterion to the effect that the Commission must find 'that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown.'

"The Department considers this proposed amendment unduly restrictive of the ability of applicants (particularly small-business men) to enter the contract carriage field, and is therefore opposed to its enactment."

The Commission's proposals were also opposed in part by the Department of Commerce. In a statement by Louis S. Rothschild, Under Secretary for Transportation, Department of Commerce, the following colloquy occurred at pages 200-201, and 202-203 of the *Hearings, supra:*

"Mr. Rothschild. . . . The bill would also give the Commission specific authority to deny an application for a permit where it is not shown that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown by the applicant. The bill would further authorize the Commission to incorporate in permits such terms, conditions, and limitations respecting the person or persons or the number of the classes of persons for which the contract carrier may perform transportation as may be necessary to assure that the permit holder's business is that of a contract carrier and within the scope of the permit.

"Senator Schoeppel. I would like to ask a question right there: Supposing you had a common carrier

serving certain territory but wasn't furnishing adequate service. There was common carrier service there, but of a very limited nature, and with the mode and extent of doing business nowadays would you draw the line there that the common carrier had to furnish reasonably adequate and prompt service?

"MR. ROTHSCHILD. Well, later in my statement, Senator Schoeppel, we say that we don't quite believe that the rules should be as stringent as proposed by the ICC and that it should not be necessary to make all of these showings in order for a person to get a contract carrier." (sic)

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"MR. ROTHSCHILD. As we read the proposal of the Interstate Commerce Commission, and then the amended position which they took in Commissioner Clark's statement yesterday, we believe that what they are currently proposing is that in the definition of a contract carrier by motor vehicle, the existence or nonexistence of common carrier motor service should be included, but when it comes to their own procedures as to how they operate under this, they retain for themselves the right to cast that qualification out.

"We think, in order to be consistent, it ought to be out both places.

"SENATOR SMATHERS. In other words, as the Senator from Kansas brought up, whether or not there is the availability of a common carrier service should not be a point in consideration?

"MR. ROTHSCHILD. They should not be able to deny the application of a common carrier[5] simply because someone claims that there is common carrier service there." (sic)

As a result of opposition to these provisions, the Commission agreed to delete the "unwilling and unable qualifications" from section 209(b). *Hearings, supra*, pp. 21-22. It did not suggest any further change in the proposed redefinition of contract carriage to remove the phrase "and not provided by common carriers". The retention of this

[5] Mr. Rothschild obviously meant to say "contract" carrier.

qualification would have had the same practical effect as the amendment originally proposed to section 209(b).

Neither S. 1384 nor H.R. 5123 were reported out of committee as introduced. In the Senate S. 1384 was drastically amended and in the House an entirely new bill was drafted (H.R. 8825). The House and Senate bills as reported and enacted were virtually identical and had the following common characteristics.

(1) The phrase "and not provided by common carriers" was eliminated from the definition of contract carriage in section 203(a)(15);

(2) The phrase "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown" was eliminated from section 209(b);

(3) Both bills set up *identical* and *specific* criteria which the Commission was directed to consider in determining whether issuance of a permit would be consistent with the public interest and the national transportation policy declared in the Act.

Specifically rejected was the original proposal in section 209(b) that a permit would be granted only upon a showing "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown." Also specifically rejected was the qualification in the definition of contract carriers in section 203(a)(15), "and not provided by common carriers."

The Senate Committee on Interstate and Foreign Commerce in Sen. Rep. No. 703, 85th Cong., 1st Sess. (1957), explained the changes in S. 1384 as follows (p. 3):

> "Undoubtedly the bill would supply a more positive statutory guide to the Commission than that existing today, and would make readily possible clearer distinctions than now exist as between motor common and contract carriers. *The committee is of the opinion, however, that as originally introduced, S. 1384*

would be unduly restrictive on contract carriage. Accordingly, the committee recommends a number of amendments to the bill." (Emphasis added.)

The Committee further noted (pp. 5-6):

"Insofar as language is concerned, there can be no doubt that some of the parties at first entertained rather sharply divergent views as to the wording Congress might wisely and fairly adopt to express its own considered judgment. That all parties or groups affected by the bill are earnestly concerned with the problems giving rise to its introduction is evidenced by the variety and range of interests appearing and testifying, and by the thoughtfulness of their presentation.

"An apparent desire to obtain constructive legislation has motivated the most active parties and groups to confer, since the hearings, to arrive at language acceptable to them, and to communicate to the subcommittee through their spokesmen their views and their proposed language. The language thus arrived at has been submitted also to the Interstate Commerce Commission, and we have been officially notified of the Commission's approval thereof. It appears to your committee that the major defects in the present statute would be corrected by the new language, and the major objectives of S. 1384, as introduced, would be achieved without unduly restricting contract carriage."

Further light is shed on the Committee changes, by Senator Smathers, Chairman of the Subcommittee which conducted hearings on the bill. In explaining S. 1384 on the floor of the Senate, he stated, 103 Cong. Rec. 14035-36 (1957):

"S. 1384, as introduced, generated sharp controversy among the carriers affected and appearing before your committee, but fortunately the bill has now been rewritten in such manner as to have the support of practically all affected interests. As it appears here today, it has not only the unanimous ap-

proval of the Committee on Interstate and Foreign Commerce, but also the full endorsement of the Interstate Commerce Commission and all types of regulated highway freight transportation as well as the railroads.

• • •

"This section (209(b)) is also amended by adding a new sentence providing that hereafter the Commission, in passing upon new permits, shall consider the number of shippers to be served, the nature of the service proposed, the effect which granting the permit would have upon protesting carriers and the effect which denying it would have upon the applicant and its shipper. In this *the Committee is proposing to give the Commission more helpful standards than are contained in the present law.* (Emphasis added.)

"The Commission came to us with a bill designed to solve the problem. The language of that bill was unacceptable to certain of the parties especially the contract carriers. Those contract carriers, however, support the bill as now drafted . . . The new bill, while not as drastic as the Interstate Commerce Commission's proposals, achieves many of the purposes sought to be achieved by the Commission in its bill."

No contention is made that the purpose or effect of the 1957 amendments was to enhance the position of contract carriers at the expense of common carriers, nor is it admitted that the purpose or effect of the amendments was to prejudice contract carriers for the benefit of common carriers. The purpose and effect was (1) to draw a clearer line of distinction between contract and common carriers; (2) to give the Commission authority to limit the number of persons which a contract carrier could serve; and (3) to provide specific criteria to be considered in deciding whether or not a proposed operation is consistent with the public interest and the national transportation policy. The amendments represent a compromise of interests. To many, the second purpose above was paramount. The Commission sought this power as a result of the decision

in *United States* v. *Contract Steel Carriers, supra.* In referring to features of the original bills which were objectionable to some, the spokesman for the Common Carrier Conference—Irregular Route, stated, *Hearings, supra,* p. 345.

> "We would yield these things to gain the main objectives, sir, and the main objective, to our point of view, is that the Commission have the unequivocal power to limit the number of contracts . . ."

The Contract Carrier Conference agreed that the Commission should have this power, but sought more definite criteria for determining consistency with the public interest and the national transportation policy, in order that, the Commission could not deny a contract carrier application on the basis of adequacy of common carrier service.

Appellants point to certain language of the General Counsel of the Contract Carrier Conference at pp. 299-300 of *Hearings, supra* as indicating that the Conference sought no change in the basic standard governing applications for contract carrier permits.[6] What was meant, and what any fair reading of the statement indicates, is that no change was sought in the statutory language "consistent with the public interest and the national transportation policy." It is also clear that while the Conference believed that the Commission should consider the effect on services of common carriers of granting the authority, it should also consider the effect which a denial would have on the contract carrier and its supporting shipper in an effort to balance the public interest. It was believed that if the Commission could limit the number of contracts of a carrier, different considerations would be appropriate in determining consistency with public interest and the national transportation policy. In fact, the amend-

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[6] Commission's main brief, pp. 38-39.

ments as a whole closely parallel proposals which the Conference had previously and unsuccessively made to the Commission in *Ex Parte MC-46* (unreported) as recommended legislation.

Both the language and legislative history of the amendments to section 209(b) preclude the Commission from requiring a contract carrier, in order to secure a permit, to show that common carriers are unable or unwilling to perform the proposed service. This language was specifically stricken. Further, we do not believe the language was omitted solely because it required an impossible burden of proof. If Congress had intended to sanction the test at all it could very well have done so by requiring in section 203(a)(15) that the proposed service must be shown to be "not provided by *protestant* common carriers" and in section 209(b) "that *protestant* common carriers are unwilling or unable to provide the type of service for which a need has been shown." Congress did neither. Instead it chose to protect existing carriers by directing the Commission to consider the effect which the granting of the permit would have upon the *services of protesting carriers.* Accordingly, we do not believe that the willingness or ability of a common carrier to render the proposed service is a relevant consideration. By employing this test the Commission has interjected into the statute a sixth test specifically rejected by Congress.[7]

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[7] Little significance can be attached to the amendments to Part IV of the Act, 49 U.S.C. 1001-1002. (Commission's main brief pp. 40-42) These provisions are entirely different for there is no parallel in the history of their administration. A freight forwarder is "any person which (otherwise than as a carrier subject to part I, II, or III of this Act) *holds itself out to the general public as a common carrier* to transport or provide transportation of property . . . " 49 U.S.C. 1002 (Emphasis added). In practice a freight forwarder is generally an assembler of freight and uses the transportation facilities of others. Neither by definition or practice is a freight forwarder comparable to a contract carrier. The legislative history of amendments to a different section of the

The Court Below in dicussing this issue said:

> "Defendants suggest that the specific criteria enumerated in the statute are not exclusive, but are only guides to be considered 'among other things' in the context of the public interest and the national transportation policy. Of course the ultimate determination is whether or not a proposed contract carrier operation is consistent with the public interest and the national transportation policy. In making this determination, however, the Commission is directed specifically to consider five definite criteria. When the Commission injects a sixth criterion, specifically rejected by Congress, it clearly has erred."

II. THE AMENDMENTS TO SECTIONS 203(a)(15) AND 209(b) SET FORTH SPECIFIC CRITERIA WHICH ARE CONTROLLING IN DETERMINING WHETHER OR NOT THE ISSUANCE OF A CONTRACT CARRIER PERMIT WOULD BE CONSISTENT WITH THE PUBLIC INTEREST AND THE NATIONAL TRANSPORTATION POLICY.

A. There Is No Contemporary Evidence That the Motor Carrier Act of 1935 Was Intended to Promote or Protect Common Carriers and the 1957 Amendments Provide the Basis for a Fair and Impartial Regulation of Contract Carriers.

In an effort to negate Congressional rejection of the willingness and ability test, the Commission contends that the test is nevertheless inherent in section 209(b) in that the language contemplates a consideration of the adequacy of existing service, particularly with respect to the effect on the supporting shipper. In support of its position the Commission also relies on what it believes to be the underlying purpose of the Motor Carrier Act of 1935 and on its own regulatory policies.

Act, involving another type of carriage and dissimilar considerations, has no bearing on the legislative history of the amendments to section 203 (a) (15) and 209 (b). Moreover, some of the comments of the Senate Committee quoted in the Commission's brief strongly suggest that the language was supplied by the Commission itself. Also it is doubtful if the Committee could otherwise have been aware of the details of the *Lifschultz* case.

It would appear that the question here is not so much the purpose of the Motor Carrier Act of 1935 but that of the 1957 amendments thereto. In any event, there is little support for the Commission's views, other than those expressed by Commissioner Joseph B. Eastman. Section 202(a) of the Motor Carrier Act of 1935 provided in part, 49 Stat. 543:

> "It is hereby declared to be the policy of Congress to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service *by motor carriers* . . . (Emphasis added).

Nowhere in this section is there any indication that the policy of Congress was to promote or protect adequate common carrier service as distinguished from other forms of motor carriage.

Nor is there any implication to the contrary in the legislative history. Although there had been various bills before Congress on the subject of motor carrier regulation, S.1629, introduced in the first session of the 74th Congress, provided the nucleus of the original Act. It was reported out of Committee, with amendments, accompanied by Sen. Rep. No. 482, 74th Cong., 1st Sess. (1935); debated in the Senate, 79 Cong. Rec. 5649-5735 (1935) and passed by the Senate on April 16, 1935. It was then referred to the House Committee on Interstate and Foreign Commerce; reported, with amendments, accompanied by H. R. Rep. No. 1645, 74th Cong., 1st Sess. (1935); and debated and passed with amendments on July 31, 1935, 79 Cong. Rec. 12196-12237 (1935). The House amendments were approved by the Senate. There is no statement or implication in the reports or debates that the purpose of the legislation was to promote or protect adequate common carrier service. The real purpose of the Act was to bring motor carriers under Federal

regulation in order to stabilize transportation conditions in general.[8]

Little weight can be attached to State statutes whether or not in some of them protection of the common carrier was recited as the purpose of regulating the contract carrier.[9] In the Federal statute Congress neither expressed nor intimated a similar policy. The source of language in later reports of Congressional committees cannot be determined, but such opinions are not controlling as to the purpose and intent of the 74th Congress in enacting the Motor Carrier Act of 1935. In fact, the Commission's whole position seems to be at variance with the National

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[8] See Sen. Rep. No. 482 *supra*, in particular the following language at pp. 2-3:

> "Motor carriers for hire penetrate everywhere and are engaged in intensive competition with each other and with railroads and water carriers. This competition has been carried to an extreme which tends to undermine the financial stability of the carriers and jeopardize the maintenance of transportation facilities and service appropriate to the needs of commerce and required in the public interest. The present chaotic transportation conditions are not satisfactory to investors, labor, shippers, or the carriers themselves. The competitive struggle is to a large extent unequal and unfair, inasmuch as the railroads are comprehensively regulated, the water carriers are regulated in lesser degree, and the interstate motor carriers are scarcely regulated at all.

[9] See the Commission's main brief pp. 17-19 and language quoted therein from *Contracts of Contract Carriers*, 1 M.C.C. 628. In this connection the only significance of *Stephenson* v. *Binford*, 287 U.S. 251, 53 S. Ct. 251 (1932) is that it upheld the power of a State to regulate private contract carriers as such, where there was no attempt to treat them as common carriers. Some State statutes have been found to be unconstitutional as applied. *Michigan Public Utilities Commission* v. *Duke*, 266 U.S. 570, 45 S. Ct. 191 (1925); *Frost v. Railroad Commission*, 271 U.S. 583, 46 S. Ct. 605 (1926), *Smith v. Cahoon*, 283 U.S. 553, 51 S. Ct. 582 (1931).

Transportation Policy [10] which provides for fair and impartial regulation of all modes of transportation and indicates that the purpose of regulation is "all to the end" of furthering a national transportation system adequate "to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense."

In any event the District Court correctly found that the statute now contemplates . . . "two forms of motor carrier service entitled to *equal recognition*, and that the interests of each must receive a *fair consideration*. (Emphasis added.) (R. 179). In this connection it is less important whether a contract carrier is a separate mode of transportation or a sub-division of a mode, than that contract carriers receive fair and impartial regulation under the Act. The 1957 amendments provide specific criteria for determining whether or not to issue a permit. Promotion or protection of common carriers is not one of the criteria; however, the public interest in common-carrier service is protected by the criteria that the effect of granting the authority on the services of common carriers is to be considered. This the Court below recognized (R. 174).

B. The Application of an Adequacy of Existing Service Test to Contract Carrier Applications Has Not Been a Consistent Practice.

It is also said that the Commission has consistently treated the adequacy of existing service as a crucial factor in passing upon applications for contract carrier authority. Although there are many cases to this effect, the practice has not been consistent. Actually, a number of elements have entered into the disposition of contract carrier applications. The adequacy of existing service test is more appropriate to a public convenience and necessity standard to insure against an overabundance of public transportation, as opposed to contract carriers who do

[10] 54 Stat. 899, 49 U.S.C. preceding sections 1, 301, 901, and 1001.

not serve the general public. In the earlier days of motor carrier regulation, the Commission appeared to recognize this, for a distinction was drawn between public convenience and necessity and consistency with the public interest indicating that the latter required a lesser showing. In such cases the Commission did not speak in terms of adequacy of existing service. In *Bassetti & Lawson Contract Carrier Application*, 1 M.C.C. 187, 189 it was stated:

> "The language of the statute makes it quite clear, we think, that the requirements for the issuance of a permit are not as exacting as those governing the issuance of a certificate. In the case of the latter, it is necessary to find that the present or future public convenience and necessity require the proposed service, whereas in the case of the former it is necessary to find only that it is consistent with the public interest and with the policy declared in section 202(a). Where an applicant proposed to operate as a common carrier the statute requires, among other things, consideration of the extent to which the territory is at present served, the need for additional common-carrier service within the territory, and the facilities which the applicant can provide to supply a common-carrier service to all shippers. Less is demanded in the case of a contract carrier."

A further illustration, is the case of *Sproul Contract Carrier Application*, 1 M.C.C. 465, 467, where protestants contended that applicant had failed to prove that the proposed operation would be consistent with the public interest; and that "public interest" was, in contemplation of the Act, synonymous with "public convenience and necessity," that the latter term meant, in substance, a strong, urgent, public need; and that without such evidence the application must be denied. The Commission rejected these contentions as unsound in granting a contract carrier application. In *Howard W. Juett Contract Carrier Applications*, 1 M.C.C. 268, 270, it was stated:

> "The evidence submitted by protestants is persuasive that the rail lines maintain adequate and efficient

service on expedited schedules both for the transportation of citrus fruit from Florida to Cincinnati and of oleomargarine in the opposite direction. The evidence in behalf of applicant is equally persuasive that there is a demand for the proposed service, and that, unless the application be granted, the corporation will continue to operate its motor vehicles, for transportation of the oleomargarine."

Thus, although the evidence was said to be equally persuasive on both sides, the application was granted.

In *T. J. Broom Contract Carrier Application,* 1 M.C.C. 425, 426, the Commission said:

"Apparently it is the theory of protestants that it is incumbent upon applicant to show that the public convenience and necessity require that he be authorized to operate as a contract carrier. They have failed to show any real damage which would accrue either to competing carriers or the public generally by reason of the granting of the authorization sought herein. On the other hand, applicant has shown that his transportation services are adequate for the purposes of the shipper with whom he contracts, and that such services, by reason of applicant's location at Woodbury, are preferable to those of other carriers available for the particular purpose of this shipper."

Following this, the Commission declared in *Jason W. House Contract Carrier Application,* 1 M.C.C. 725, 735:

"We may not presume that, because applicants may compete with motor carriers entitled to rights under the 'grandfather' clause, the interests of the competing motor carriers will be adversely affected to such extent that applicants' operations will be inconsistent with the public interest and the policy of Congress declared in section 202(a). The mere showing that such competition exists is not enough. The alleged adverse effect must be proved."

In *Motor Convoy, Inc., Contract Carrier Application*, 2 M.C.C. 197, 202, the Commission made the following statement:

> "While it appears that there is *adequate* common carrier service between Gadsden and Atlanta, Cartersville, Rockmart and Cedartown, it is also apparent that applicant's service, by reason of the special handling accorded Goodyear's shipments is more convenient for, and better suited to the needs of, this shipper than is common carrier service." (Emphasis added.)

Perhaps a fair summary of the Commission's earlier attitude is the following language from *Jason W. House*, 1 M.C.C. 725, 736:

> "The basic test in determining whether a permit shall be issued is not public convenience and necessity but consistency with the public interest and the policy declared in section 202(a) of the Act . . . In absence of evidence that the continuation or institution of operations by these applicants as contract carriers of petroleum products from and to the considered points would adversely affect other carriers by motor vehicle now lawfully engaged in transportation of like traffic from or to these points, or that applicants are not fit, willing, and able to provide transportation as contract carriers, there is no valid basis for denying these applications."

It is true that in many of the later decisions of the Commission, it did apply the adequacy of existing service or unwillingness or inability test, thereby requiring the contract carrier to prove, in effect, public convenience and necessity. This was one of the conditions Congress hoped to correct by giving the Commission more definite standards for deciding the issue of consistency with the public interest. In commenting on the Commission's change in attitude with respect to granting contract carrier ap-

plications, and the effect of the amendatory language on this attitude, the Court below said (R. 178):

> "Earlier, it was required that once a contract carrier applicant had established a prima facie case, there was some burden on the protestants to come forward with evidence in rebuttal. See *Jason W. House Contract Carrier Application*, 1 M.C.C. 725. At about the same time the Commission held that the availability of adequate common carrier service alone did not preclude the granting of a contract carrier authority. See *T. J. Broom Contract Carrier Application*, 1 M.C.C. 425; *Howard W. Juett Contract* [fol. 244] *Carrier Application*, 1 M.C.C. 268. Clearly the effect of the amended statute is to restore these procedures to a degree, and to give emphasis to the shipper's preference, which underlies the special concept of contract carriage in any case. And it is clear that under the narrow definition of contract carriage found in the new law, there is no occasion, necessity or warrant for the same standards of proof in both applications."

Even the Commission's interpretation of the statute since the 1957 amendments has not followed a consistent pattern. A number of applications, including the one which is the subject of this appeal, were denied primarily on the basis that existing common carriers were able and willing to handle the traffic involved, despite the fact that this language had been deleted from the bill by Congress. Several of these cases were noted by the District Court and the applicable language was quoted in its opinion (R. 170-172). The cases include *Carolina Haulers, Inc., Contract Carrier Application*, 76 M.C.C. 254, 256; *Leo Holt, Jr., Extension—Pilings*, 77 M.C.C. 141, 144; *Wagner Contract Carrier Application*, 77 M.C.C. 777, 781; and *Elvin L. Reddish Contract Carrier Application*, 81 M.C.C. 35, 40 (also the subject of an appeal). The Court also cited the language used by the Commission in the common carrier case of *Ray D. Viengst Common Carrier Application*, 79 M.C.C. 265, 268, and noted that it was almost identical to that used

in the *Wagner* contract carrier case, *supra*. There is no doubt that the Commission has in some instances continued to apply a public convenience and necessity standard to contract carrier applications, using a test rejected by Congress.

On the other hand, there have been instances where the Commission has applied the statute in a different manner, giving less weight to the availability of common carrier service and more to a balancing of interests among applicant, the supporting shipper, and existing carriers. In some of these cases authority has been granted, on various theories, despite the fact that protesting common carriers appeared to be willing and able to handle the traffic.

In *William Edward Leary Extension—Willimantic, Conn.*, 81 M.C.C. 553, 557, the Commission made a specific finding that all protesting motor carriers were able and willing to handle additional traffic of the kind involved and feared that a grant of authority would drain traffic from their territories to their detriment. Some of the protestants had actually transported traffic for the supporting shipper while others had not. Despite this finding the Commission granted the application stating (pp. 558-559):

> "Our consideration of the evidence in the light of the criteria heretofore set out leads us to the conclusion that a need exists for the proposed service. The shipper requires the services of applicant who proposes to furnish it what is generally described as house carrier service, in that the applicant will furnish equipment around the clock; operate such equipment as directed by the shipper; his employees will work as an integral part of the plant's operations; and he is expected to and will provide service at times and in a manner which is not normally furnished by common carriers. Applicant presently furnishes this manner of service to the shipper as an intrastate carrier and desires to extend this to interstate service. While some traffic will be diverted from the existing carriers, it is fairly established that improvements in service

will result in benefits to the supporting shipper and its customers far outweighing any possible ill effects upon the opposing carriers."

In *Caledonia Lines, Inc., Extension—Utica, N. Y.*, No. MC-108313 (Sub No. 7), Division 1, July 31, 1961 (not printed in full), the following statement appears:

"The pertinent authorities, operations, and facilities of the motor protestants are described in detail in the examiner's report and need not be repeated here. Collectively, they can serve directly or through interline carriers, over both regular and irregular routes, practically the entire territory involved. They desire to participate in the traffic to the extent authorized by their certificates.

"Applicant seeks authority to extend its operations commoditywise and territorially to enable it to provide a complete service for Jones. Applicant has served as a contract carrier for Jones for many years. The supporting shipper's traffic represents all of applicant's interstate transportation. A grant of the requested authority will not deprive protestants of any traffic they now handle. Moreover, it is not likely that protestants would be tendered any of the involved traffic if the instant application were denied."

In *W. G. McCarty Contract Carrier Application*, No. MC-119898, Division 1, May 31, 1961 (not printed in full) the Commission made the following findings:

"In determining that the issuance of a permit will be consistent with the public interest and the national transportation policy we have considered the five tests enumerated in section 209(b): (1) applicant proposes to serve only one shipper; (2) the evidence clearly shows that it proposes a specialized service that common carriers, in general, and protestant carriers, in particular, do not normally provide; (3) a grant will have a negligible adverse affect on protestant inasmuch as they are not presently participating in the traffic and are not likely to do so; (4) a denial will prevent shipper from receiving a service necessary to meet competition and to reduce costs, and (5) shipper

support for the application is based on a careful survey of its new transportation requirements. Although the opposing carriers assert a willingness to serve shipper, we believe that the proposed service is needed and that it would be superior to that available from existing carriers."

In *Nyad Motor Freight, Inc., Contract Carrier Application*, No. MC-118567, Division 1, August 11, 1960 (not printed in full), the decision turned to a large extent on the changing character of the shipper's requirements and the application was granted despite the availability of common carrier service. The Commission found in part:

"The effect of a grant of authority upon the services of protesting carriers is steadily disminishing; already large portions of the traffic formerly handled by them have been diverted to private carriage. Whether a grant of this application would accelerate the process of erosion cannot be stated with certainty, but it seems reasonably clear that carriers such as Helm's cannot retain their present share of the traffic regardless of the disposition of this proceeding.

"The effect on applicant of a denial would naturally be adverse, even though its president would presumably continue his present business relationship with the shipper. The effect of a denial upon the supporting shipper, Grant, would be to obstruct the progress of that shipper's newly adopted mode of distribution. It is true that protestants collectively are authorized to meet the shipper's transportation needs and that they assert their willingness to handle its merchandise in hampers. Their ability, however, to accomplish the practical, individualized operation envisioned by the shipper is far from demonstrated. The shipper has made represenative use of existing service in the past, but the character of its distribution requirements under the changing circumstances discussed above no longer permits reliance on that service."

In *J. Capone & Sons, Inc., Contract Carrier Application*, 83 M.C.C. 505 a protesting common carrier was authorized to perform the proposed service and was willing to do

so. The evidence indicated that the common carrier was . . . willing to make special deliveries in lieu of its normal overnight service and to provide service on weekends, holidays, and after business hours. Although it served approximately 800 shippers, equipment was available which could be placed at the shipper's plant within 15 minutes. (p. 508). With this evidence before it the Commission found (p. 509)

> "A number of the services required, such as multiple pickups and deliveries and perhaps even the handling of exports and imports at the piers, could be provided satisfactorily by common carriers, or, at any rate, are services sometimes performed by common carriers. On the other hand, the constant availability of equipment at the shipper's plant, the integration of that equipment into its operations and the specialized services required at warehouses and piers warrant the conclusion that the shipper is entitled to the services of a contract carrier. With respect to (c), no existing carriers presently enjoys the traffic and a denial of the application conceivably could force applicant out of business and cause the shipper to resort to private carriage. Clearly, the adverse effect which a denial of the application would have upon applicant and the shipper outweighs any possible adverse effect that a grant of authority would have upon any existing services."

In this case there was no finding that existing service was inadequate. Instead the Commission balanced the various factors involved in the manner contemplated by the statute.

Thus the Commission cannot rely upon a consistent practice of articulating adequacy of existing service as a test for determining whether or not to issue a permit. The Commission has considered many factors, and has not consistently followed the adequacy of existing service test for it has ignored the test in many cases both before and after the 1957 amendments.

C. The 1957 Amendments Were Intended to and Did Change Existing Law and Do Not Include the Extraneous Tests Employed by the Commission.

Under section 209(b) as amended, the Commission is still directed to issue a permit upon a finding that the proposed operation will be consistent with the public interest and the national transportation policy. In making this determination, however, it is now specifically required to consider and apply five statutory tests; namely (1) the number of shippers to be served by the applicant, (2) the nature of the service proposed, (3) the effect which granting the permit would have upon the services of the protesting carriers, (4) the effect which denying the permit would have upon the applicant and/or its shipper, and (5) the changing character of that shipper's requirements.

The amendments were meant to and did change existing law. "While the burden of proving a contract carrier application to be consistent with the public interest and the national transportation policy was not eliminated, the standards of meeting this responsibility were changed,"[11] and these standards do not involve a showing that common carriers are unwilling or unable to handle this traffic. This proposed requirement was specifically rejected by Congress. Both the language of the statute and its legislative history support the view that the Commission lacks authority to apply this test as a condition for granting a permit. In the District Court the Commission apparently conceded the validity of this position, but contended that it was proper to consider the "adequacy of existing service." Appellants continue to urge this proposition based partially on the alleged consistency of its application, and partially on their view that it is inherent in the criteria set forth. We have already demonstrated that it has not been consistently

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[11] See the remarks of Senator Smathers, *supra*, 103 Cong. Rec. 14035-36, where in discussing the changes in section 209 (b) he stated that "the Committee is proposing to give the Commission more helpful standards than are contained in the present law."

applied. We also believe that it is not a part of the criteria involved.

The adequacy of existing service test is indistinguishable from the willingness and ability test. For a carrier's service to be adequate, the carrier must first be willing to handle the traffic. In addition, it must also be *able* to handle the traffic to the satisfaction of the shipper. If a carrier is willing to handle the traffic, and is *able* to handle it in such a way as to satisfy the shipper's requirements, then its service may be said to be adequate. Conversely, if a carrier is unwilling to handle the traffic, or is unable to handle it in such a way as to satisfy the shipper's requirements, then obviously its service is inadequate. Adequacy, as used by the Commission, is a term embracing either willingness or ability or both. Over the years, the terms have, in fact, sometimes been used interchangeably. In cases cited by the District Court (R. 170-172), the willing and able test appears to be either the same as the adequacy test or the controlling factor in determining adequacy. In the instant proceeding, the Commission said that considering U.S.A.C.'s service to other shippers, and its ability and willingness to provide service to the supporting shippers, it could not be found that existing service has been shown to be inadequate. (R. 47). We see no possible way in which existing service can be found adequate without a finding, whether specific or implied, that existing carriers are willing and able to perform the proposed service, thereby employing the very standard which Congress rejected. The District Court concluded, correctly we believe, that there was no practical distinction between the tests; and that to the extent applicant had been required to show the protesting common carriers were unable or unwilling to meet the shipper's requirements, the standard was not supported by the language of section 209(b) whether under the guise of an "adequacy tests" or otherwise. (R. 177).

Of course a primary reason for bringing motor carriers under regulation was to bring about more stability and to

cure conditions resulting from over-competition. Prior to the 1957 amendments a contract carrier was free to actively solicit new business, acquire new shippers and generally to expand into the common carrier field if he saw fit and could do so. In such circumstances there might have been some justification for the Commission's use of an adequacy of existing service test in deciding contract carrier applications, in order to prevent these carriers from entering the general freight hauling field. Under the 1957 amendments this justification no longer exists. The Commission acquired the power to, and now regularly does, limit the service of a contract carrier to the shipper or shippers supporting the application. This power and its exercise eliminated the possibility that a contract carrier could actively solicit other business and insured that the service would be limited to the specific shippers for whom it was granted. It effectively removed the contract carrier from the field of general transportation and reinstated it in its more historic role as a substitute for private carriage. Since the carrier was no longer able to expand its activities to the point of serving large areas of the public, there was no longer any valid reason for requiring a showing of inadequacy of common carrier service. In the words of Commissioner Webb "the need to employ a public convenience and necessity standard in Section 209 proceedings disappeared when under the new law, permits ceased to be unrestricted licenses for hunting traffic." (R. 51). Congress appeared to be of the same opinion for it adopted specific criteria for determining contract carrier applications, none of which in our view involves adequacy of existing common carrier service.

The first test under the statute is the number of shippers to be served. This relates to whether applicant intends to serve "one or a limited number of shippers," and thus meet the first part of the definition of a contract carrier under section 203(a)(15) of the Act.

The second test involves the nature of the service proposed. We believe this second test also relates back to the definition of a contract carrier in 203(a)(15). If the service proposed involves either (a) the furnishing of transportation services through the assignment of vehicles for a continuing period of time to the exclusive use of each person served or (b) the furnishing of transportation services designed to meet the distinct need of each indvidual customer, then the proposed service is that of a contract carrier. This test does not, in our opinion, require a determination of whether the service proposed and shown to be needed by the supporting shipper is one which might be performed by either a common or contract carrier, or by one such class of carriers only. By adopting this attitude, the Commission is reading back into section 203(a)(15) that part of the definition which was omitted by Congress, namely, the phrase "and not provided by common carriers."

This whole area admittedly produces some apparent contradictions, since in theory contract and common carriage ought to be mutually exclusive. In practice, however, there sometimes is not much difference in actual operations, and there are areas where either type of carrier might be satisfactory. This fact, however, cannot be controlling because it involves a consideration rejected by Congress. Much of the value of contract carrier service lies in the fact that it does not serve the public generally and therefore can give greater attention to the needs of its particular customers. Even though from a purely mechanical standpoint a common carrier might be able to duplicate the operation, it does not follow that the service will be the same. And since Congress eliminated the phrase "and not provided by common carriers" from section 203(a)(15) as originally proposed, we think it error for the Commission to read this phrase back into the provisions of section 209(b) under the guise of considering the nature of the service proposed. If the proposed service involves either

the furnishing of transportation service through the assignment of vehicles for continuing period of time to the exclusive use of each person served or the furnishing of transportation services designed to meet the distinct need of each individual customer, the nature of the proposed service is that of a contract carrier.

The third criterion requires a consideration of the effect which granting the permit would have upon the *services* of protesting carriers. It is designed to afford a measure of protection for these carriers as was so found by the District Court (R. 174). This criterion does not contemplate consideration of the mere existence or availability of a protesting common carrier, which claims to be in a position to handle the traffic, but rather what effect, if any, granting of a permit would have on the *services* of such carrier. Where, for instance, a protesting carrier is actually serving a supporting shipper, and is participating in the traffic involved, the granting of a permit would be likely to divert traffic from the protesting carrier, with an attendant loss of revenue. If the diversion of this traffic would cause the services which the protesting carrier could offer to the public to be adversely affected to a material degree, then this should be considered by the Commission as one of the elements in deciding the issue of consistency with the public interest. Where, however, the protesting carrier is not participating in the traffic involved, there can be no diversion of traffic and hence ordinarily no effect on its services.

The fourth criterion involves a consideration of the effect which denying a permit would have upon the applicant and/or its shipper. The Commission's view is that the effect on the shipper must depend upon the adequacy of existing service, which has the effect of providing additional protection for existing carriers. This provision can scarcely have been placed in the statute as an added protection for existing carriers, for their interest is protected by the preceding criterion. Rather, this provision quite obviously

was inserted in order to protect the shipper and the applicant, and to insure that their interests would receive the same consideration and be weighed in the same balance as those of opposing carriers. The District Court stated that "to a notable degree, this provision emphasizes the new distinction required by Congress between a common carrier certificate of public convenience and necessity, and the contract carrier's permit." (R. 175)

Whether or not adequacy of service is a part of a "public interest" standard, as contended by appellants, in the absence of more specific language is not germane in this case. Nor is the latitude which Courts have accorded "public interest" as a standard in other circumstances a controlling factor. In the statute under consideration, Congress has specifically enunciated its own standards for determining consistency with the public interest. The discretion which might otherwise attach to such a determination is not present here. Although the ultimate determination to be made is whether or not a proposed contract carrier operation is consistent with the public interest and the national transportation policy, the Commission is directed to consider five specific criteria. Adequacy of existing service is not one of these criteria; and its apparent equivalent, the willingness and ability of common carriers to provide service, was rejected by Congress. To adopt the construction urged by the Commission would be reading into the Act by implication what the Legislature rejected.[12]

There is nothing inconsistent here with the imposition of so-called "auxiliary and supplemental" restrict ons in the authority of motor carrier subsidiaries of railroads or with the views expressed in *American Trucking Associations, Inc.*, 364 U.S. 1, 80 S. Ct. 1570 (1960). The Court

[12] The court refused to follow this course in *Territory of Alaska* v. *American Can Company*, 358 U.S. 224, 227, 79 S. Ct. 273, 276 (1959).

was there dealing with section 5(2)(b) of the Act, 49 U.S.C. 5 (2)(b), relating to railroads or persons controlled by or affiliated with railroads. The principal question involved was the Commission's failure to impose certain limitations upon authority issued under section 209(b) to a motor carrier subsidiary of a railroad. The Court recognized that the National Transportation Policy and section 5(2)(b) express a general Congressional policy against railroad invasion of the motor carrier field and that the policy of section 5(2)(b) cannot be divorced from section 209 of the Act. While this involved a consideration of the National Transportation Policy and application of the Act as a whole, the actual problem was the Commission's lack of findings as to special circumstances to justify its failure to impose limitations sufficient to hold the carrier to a truly auxiliary and supplemental service.

In the instant case there is no Congressional policy that requires the Court to consider criteria other than those in section 209(b), or even suggests that it would be proper to do so. Nor is any different conclusion warranted by the Court's finding in *Schaffer Transportation Company* v. *United States*, 355 U.S. 173, 187-88, 78 S. Ct. 173, 176 (1957), that the National Transportation Policy is the yardstick by which the correctness of the Commission's actions will be measured. Rather the 1957 amendments and the criteria set forth in section 209(b) are intended to further the interests of the National Transportation Policy by providing the Commission with more helpful standards in deciding consistency with that policy and with the public interest. The sharper distinction drawn between contract and common carriers also indicates increased recognition of their distinctive role in transportation, and justifies the preservation of their inherent advantage under the National Transportation Policy.

The appellants rely upon *Bass* v. *United States of America*, 163 F. Supp. 1 (W. D. Va., 1958), *aff'd* 358 U.S. 333,

179 S. Ct. 351 (1959). In this case the appellant sought authority to transport passengers as a contract carrier. The common carriers of passengers who opposed the application also provided contract carrier services pursuant to the provisions of section 208(c) of the Act. In this case neither the Commission nor the Court gave any consideration to the five criteria set forth in section 209(b). The Court upheld the Commission's decision denying the application, not on the basis that common carrier service was available, but on the basis that contract carrier service was available. For those reasons the *Bass* case has no application to the case at Bar.

Appellants also rely upon the case of *Alexandria, Barcroft and Washington Transit Company* v. *U. S.* (E. D. Va., 1961), 14 F.C.C. Section 81,395. Here the Court decided that the service proposed was not that of a contract carrier, but that of a common carrier and for this reason reversed the Commission's decision granting contract carrier authority. The issues raised by the case at Bar, namely the proper application of the criteria in section 209(b) were not considered or discussed by the Court and any holding by the Court beyond the finding that the service proposed was that of a common carrier was *obiter dicta*. For these reasons, this case has no application to the instant one.

III. THE DISTRICT COURT ACCURATELY APPLIED THE STATUTE TO THE FACTS OF RECORD AND DID NOT SUBSTITUTE ITS JUDGMENT FOR THAT OF THE COMMISSION.

Appellants, U.S.A.C., and the two Common Carrier Conferences contend that the District Court substituted its judgment for that of the Commission. This contention is without merit.

We would like to point out that the views expressed in the Commission's report only represent the thinking of a minority. Of the eleven Commissioners, four did not participate in the decision, one dissented, two concurred in

the result and one concurred in the result, expressing strong opposition to the employment of the sixth test. There were only three Commissioners who actually adopted the report as written (R. 51-52). Even though, the report expressed the views of the minority, the District Court did not substitute its judgment for that of the Commission.

The Court, as stated by appellants, did find that the Commission had imposed upon the applicant, the burden of showing that existing services are inadequate (R. 170). Appellants contend that this amounts to the Court substituting its judgment for that of the Commission because it was the protestant who proved what services it could perform. This argument is without merit for it completely ignores the fact that the basis for the Commission's denial was that the protestant's services had not been shown to be inadequate, a finding which clearly imposes the burden on the applicant which the Court found to be improper under the law. In reaching this conclusion, the Court interpreted the law and did not substitute its judgment for that of the Commission.

The District Court did find, as stated by appellants, that the Commission gave no consideration to the shipper's need for contract carrier service. However, simply because the Commission did consider the specialized service of the protestants does not justify the contention that the Court substituted its judgment for that of the Commission. The Court also found that: "The statute now contemplates two forms of motor carrier service . . . Now an element of shipper's service has been affirmatively recognized by Congress. . . . Under the statute a shipper is entitled to have his distinct needs met." (R. 175) It was the failure on the part of the Commission to recognize the evidence of the applicant as to this phase of the case which the Court critized, and by so doing it was not substituting its judgment for that of the Commission.

Appellants contend that the District Court held that the Commission *may not* deny a contract carrier application simply because the applicant has failed to meet one of the criteria. This the Court did not hold. It did say that the five criteria must be weighed or balanced and that failure to meet all five " . . . does not mean necessarily, . . . the Commission is warranted in rejecting the application." It also said that even if the Commission should find that a proposed contract carrier service would adversely affect a protesting carrier's service ". . . that in and of itself does not necessarily justify a denial of the permit." Here the Court was not substituting its judgment for that of the Commission, but interpreting the intent of Congress as expressed by the language in section 209(b).

SUMMARY OF ARGUMENT AND CONCLUSION

Congress by amending sections 203(a)(15) and 209(b) radically changed the entire concept of contract carrier regulation. The definition of a contract carrier was limited drastically, the Commission was granted broad powers to restrict the service which such carriers could perform even to limiting the service to a particular shipper, and definite standards were provided for determining whether a proposed service was consistent with the public interest. The standards did not include the "adequacy of service" or "willingness and ability" tests. In fact the latter test, though suggested by the Commission, was specifically rejected by Congress. The adequacy of existing service or the willingness and ability of protesting carriers to perform a proposed service are no longer proper tests for the Commission to apply.

The Commission's contention that it has consistently applied the above standards is without merit for it has not done so. Even if this were the case it now has a clear mandate from Congress not to apply such standards in the future. The services of common carriers are to be pro-

tected by weighing or balancing the effect on protesting carrier's services against the effect of denial of the application upon the applicant and its supporting shipper. This provision gives common carriers ample protection and assures shippers of contract carrier services when consistent with the public interest and the national transportation policy.

The lower Court's decision in this case correctly interprets the law. It recognizes that Congress intended to regulate contract carriers differently than they had previously been regulated and not only gives the Commission ample opportunity to protect the interests of existing carriers, but affords the Commission broad discretionary powers under the standards prescribed by Congress to carry out the provisions of the national transportation policy; even though, it does not impose the onerous burden of proof on contract carriers to prove that protesting carriers' services are inadequate. The Court by so construing the statute, did not substitute its judgment for that of the Commission, but simply gave the meaning to the true intent and purpose of the amendatory legislation.

Appellee, Contract Carrier Conference of the American Trucking Associations, Inc., for the foregoing reasons, respectfully submits that the judgment of the District Court should be affirmed.

Respectfully submitted,

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APPENDIX

Text of Statute Involved

Prior to August 22, 1957	Subsequent to August 22, 1957
Former § 203(a)(15)	*Amended § 203(a)(15)*
"The term 'contract carrier by motor vehicle' means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation."	"The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer."
Former § 209(b)	*Amended § 209(b)*
"Application for permit; form and contents; issuance of permit; terms and condition.—Applications for such permits shall be made to the commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the commission may, by regulations, require. Subject to section 210, a permit shall be issued	"Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations

Former § 209(b)

to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules and regulations of the commission thereunder, and that the proposed operation, to the extent authorized by the permit, will be consistent with the public interest and the national transportation policy declared in this act; otherwise such application shall be denied. The commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof and shall attach to it, at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations consistent with the character of the holder as a contract carrier as are necessary to carry out, with respect to the operations of such carrier, the requirements established by the commission under section 204 (a)(2) and (6): *Provided, however*, That no terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, or to add to his or its equipment and facilities,

Amended § 209(b)

covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied. In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements. The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations, con-

Former § 209(b)

within the scope of the permit, as the development of the business and the demands of the public may require."

Amended § 209(b)

sistent with the character of the holder as a contract carrier, including terms, conditions and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service, as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out with respect to the operation of such carrier the requirements established by the Commission under section 204(a)(2) and (6): *Provided,* That within the scope of the permit and any terms, conditions or limitations attached thereto, the carrier shall have the right to substitute or add to its equipment and facilities as the development of its business may require: *Provided further,* That no terms, conditions or limitations shall be imposed in any permit issued on or before the effective date of this proviso which shall restrict the right of the carrier to substitute similar contracts within the scope of such permit; or to add contracts within the scope of such permit unless upon investigation on its own motion or petition of an interested carrier the Commission shall find that the scope of the additional operations of the carrier is not confined to those of a contract carrier as defined in section 203(a)(15), as in force on and after the effective date of this proviso."